82-1217
No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

SEYMOUR R. MATANKY, M.D. and
CORBIN MEDICAL CLINIC,

Petitioners,

vs.

UNITED STATES OF AMERICA,
SECRETARY OF HEALTH, EDUCATION
AND WELFARE, AND BLUE SHIELD OF
CALIFORNIA, a corporation,

Respondents.

Judicial Review Pursuant to Article III,
U.S. Constitution and Title 28 U.S.C., Section 1491, and
Fifth Amendment, U.S. Constitution of Medicare Act, Part B
Claims Administrative Review

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Corbin Medical Clinic

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QUESTIONS PRESENTED

1. Whether the Medicare Act, Title 42 U.S.C., Section 1395j, et seq., and particularly Title 42 U.S.C., Section 1395ff, inherently and as construed and applied, denies due process of law as guaranteed by Article III, United States Constitution and the Due Process Clause of the Fifth Amendment, U.S. Constitution where it is applied so as to deny to your petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic his medical business as assignees of Medicare Act, Part B claims, absolutely all federal judicial review by Judges duly appointed and sitting under Article III, U.S. Constitution of Medicare Act Part B constitutional claims alleged by your petitioners to arise under the Fifth Amendment, U.S. Constitution.

2. Whether the United States Congress is without authority to pass legislation as

contained in Title 42 U.S.C., Section 1395ff(b) totally precluding federal judicial review by Article III Judges of constitutional claims arising under the United States Constitution.

3. Whether claimants under Part B, Medicare Act, Title 42 U.S.C., Sections 1395j, et seq., are entitled to be heard under Article III of the United States Constitution to the same degree and extent as litigants in bankruptcy matters.

4. Whether the failure to permit the petitioner access to the Federal Courts, either in the United States District Court for the Central District of California or in the United States Court of Claims for review of his suit and claim on constitutional bases that his claims had been improperly reduced, constitutes a substantial, material, prejudicial violation of due process of law and the right to an Article III federal Judge under Article III and the Fifth Amendment of the United States Constitution, and was a

denial of the equal protection and equal application of the laws.

5. Whether the failure to permit the application of the Tucker Act, Title 28 U.S.C., Section 1491, providing for hearing and determination in the United States Court of Claims concerning Medicare Act, Part B payments and claims, so that physicans and patients may seek determinations and consideration of their respective positions by at least one federal judicial review of Article III judges under Article III, U.S. Constitution and the Fifth, Sixth and Seventh Amendments, U.S. Constitution, constitutes violations of said constitutional provisions and is a denial of the equal application of Title 28 U.S.C., Section 1491.

6. Whether permitting the Government to recoup and setoff later payments after the apparently applicable three-years statute of limitations and further reduce recovery by a physician who has accepted Medicare Act, Part B assignments

that have been reviewed, reduced and paid on previously, constitutes a substantial deprivation of property without due process of law in violation of the Fifth Amendment, U.S. Constitution.

7. Whether totally foreclosing the right of Medicare Act, Part B payment recipients and/or beneficiaries (doctors and their patients) from seeking independent federal judicial review by Judges who are duly authorized Judges pursuant to Article III, U.S. Constitution, after administrative determinations by hearing officers assigned by and paid by private parties who are insurance carriers is a substantial, material, harmful, prejudicial, per se violation of the rights of litigants involved to have access to the federal Courts and federal judgements under Article III and the Fifth Amendments, U.S. Constitution, when the applicable statute of limitations was expanded for the apparent purpose of this petitioner's claims and review.

8. Whether the constitutional issues involving the allegations of denials of due process of law were of the nature that petitioner was entitled to have evidentiary hearings and determinations on same by a duly authorized United States District Judge, and whether the United States Court of Claims had no jurisdiction to review or consider same or dismiss same and was required, on the motion of the petitioner, to have transferred the above entitled matter back to the United States District Court for the Central District of California. (Schweiker v. McClure, 72 L.Ed.2d 1 101 S.Ct.___) Whether the failure to transfer the above matter back to the United States District Court for review and consideration constituted acts in excess of the jurisdiction of the U.S. Court of Claims and was a violation of due process of law and the equal protection of the laws as guaranteed by Article III and the Fifth Amendment, U.S. Constitution.

9. Whether the dismissal of your petitioners' claims as part of the wholesale dismissal of all suits pending in the Court of Claims, involving applications for federal court judicial review of administrative determinations by the Social Security Administration, as made pursuant to Part B of the Medicare Act, Title 42 U.S.C., , Section 1495, et seq., on the ground that the federal courts lack jurisdiction to consider same pursuant to Erica, and without remanding the action to the appropriate U.S. District Court for litigation of the due process of law issues raised under the Fifth Amendment, U.S. Constitution, is arbitrary and capricious and whether same was plain error on the face of the record, and harmful, prejudicial, material, and substantial.

10. Whether the U.S. Court of Claims' dismissal of this action is contrary to the law as contained in Schweiker v. McClure, 72 L.Ed. 2d 1, 101 S.Ct.___ providing for determination of due process inssues by the approopriate federal district courts.

11. Whether the plaintiff was entitled as a matter of law to a hearing on the merits of his allegations of denials of due process of law, and whether it was material, substantial, prejudical, harmful, reversible, per se, plain error and violations of due process of law as guaranteed by the Fifth Amendment, U.S. Constitution for the due process issues to be litigated on a non-evidentiary proceeding on a motion to dismiss in the U.S. Court of Claims. (First National Bank of Arizona v. Cities Service Co., Inc., 391 US 253, 288, 20 L.ed.2d 569 (1968); Leone v. Aetna Casualty & Surety Co., 599 F.2d 566; Conley v. Gibson, 355 US 41, 45, 2 L.ed.2d 80 (1957); Cruz v. Beto, 405 US 319, 31 L.ed.2d 263 (1972))

12. Whether Matanky v. U.S. is distinguishable from U.S. v. Erika, Inc., 72 L.ed.2d 12.

13. Whether Matanky v. U.S. could be dismissed by the United States Court of Claims on a motion to dismiss, without an evidentiary adjudication on the merits pursuant to U.S. v. Erika, Inc., 72 L.ed.2d 12 and Schweiker v. McClure, 72 L.Ed. 1, 101 S.Ct.___.

14. Whether the U.S. Court of Claims, pursuant to other decisions in its court could dismiss the due process claims of the petitioners herein although these petitioners were not parties to those actions and they were therefore not binding on petitioners. Whether there was a failure to accord these petitioners notice and the opportunity to be heard in regard to the facts of other matters pending in the U.S. Court of Claims, and the concepts of collateral estoppel and res judicata could not be applied to these non-parties.

15. Whether the failure of the Medicare Administration to notify the parients whose claims were being adjusted for a second time and not paid on at all as a result thereof, or to notify subsequent claimants whose payments were being allotted to recoupment from the petitioner constituted and constitutes a denial of due process of law both to them as patients and to the physician, and particularly a deprivation of property without due process of law.

16. Whether the activation of a recoupment procedure well after the applicable statute of limitations constitutes a deprivation of proeprty without due process of law in violation of the Fifth Amendment, U.s. Constitution.

17. Whether U.S. District Court within the Ninth Circuit transferred the above entitled Medicare Act, Part B litigation to the U.S. Court of Claims on the basis that it had exclusive jurisdiction to consider the factual

metits of due process claims of plaintiffs-petitioners, and whether the U.S. Court of Claims committed substantial, material, prejudicial, harmful, per se, plain error in failing to transfer the due process portion of the above entitled matter back to the U.S. Dictrict Court for its adjudication when it held that it did not have jurisdiction to consider same. (Drennan v. Califano, 606 F.2d 850 (9th Cir.) Whether this denied the petitioners the right to be heard by an Article III federal judge, and denied the petitioners access to the federal Courts in violation of Article III, U.S. Constitution and the Fifth, Sixth, and Seventh Amendments, U.S. Constitution.

18. Whether the failure to provide the petitioners with a pre-recoupment administrative hearing procedure, where recoupment occurred in June, 1971 and audit started in 1974. Along with the withholding of funds amounting to $51,000 as of 1971, but the "audit" was not concluded until

1976 and there was no administrative hearing until 1978 on said recoupments, constituted a substantial, material, harmful, prejudicial, per se denial of due process of law in violation of the Fifth Amendment, U.S. Constitution. (Fusari v. Steinberg, 419 US 379, 42 L.ed.2d 521) Whether the administrative hearing was so lacking in speed and rapidness due to the fact that it could not occur until after an "audit" which was not concluded until about five years by the Medicare Administration that any prehearing recoupment was tantamount to no effective hearing or review by the massive delay and therefore amount to confiscation of property without due process of law and was arbitrary and capricious in violation of the Fifth Amendmant, U.S. Constitution.

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NO.

IN THE

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OCTOBER TERM, 1983

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Judicial Review Pursuant to Article III,
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U.S. Constitution of Medicare Act,
Part B Claims Administrative Review

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS
AND TO THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Come now the petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic and petition this Honorable Court for a writ of certiorari directed to the United States Court of Claims, the United States Court of Appeals for the Federal Circuit and the United States District Court for the Central District of California to review and reverse and thereafter remand same for full evidentiary hearings in accordance with Article III, U.S. Constitution and the Fifth, Sixth and Seventh Amendments, U.S. Constitution after an order and notification dated October 22, 1982, the United States Court of Appeals for the Federal Circuit denying their petition for rehearing.

Your petitioners, a physician, Seymour R. Matanky, M.D., and a clinic, Corbin Medical Clinic, sought administrative review and independent federal judicial review of federal constitutional claims under the Fifth, Sixth and Seventh Amendments, U.S. Constitution

and Article III, U.S. Constitution, concerning about 2414 claims under the Medicare Act, Part B, made to the Medicare Administration between the years 1967 and 1973, pursuant to Title 42, U.S.C., Sections 1395 et seq. (known as the Medicare Act) for medical services to the elderly and otherwise qualified persons.

These 2414 claims, involving about 305 patients of your petitioners, had been previously reviewed, adjusted and reduced and thereafter paid on by the Medicare Administration, in about the sum of $50,899.00. On a second, further review by the Medicare Administration, with recoupment commencing in about June, 1971 and an audit starting in 1974, a prehearing recoupment procedure was initiated by the withholding of about $51,000.00 in later payments as setoff funds. These are the funds and procedures in dispute and in question.

Your petitioners have been unable to obtain an independent federal jucicial review of their constitutional claims pursuant to Article III,

U.S. Constitution or the Fifth, Sixth and Seventh Amendments, U.S. Constitution. After the action of your petitioners was transferred from the U.S. District Court for the Central District of California to the U.S. Court of Claims on the grounds that it was the federal court having jurisdiction, the U.S. Court of Claims dismissed your petitioners' action on the ground that it had no jurisdiction either, citing U.S. v. Erika, Inc., 72 L.Ed.2d 12, 101 S.Ct.

Your Petitioners raised an extensive number of federal constitutional issues, including the lack of right of the Medicare Administration to "recoup" funds after what appear to be the applicable statutes of limitations as being a denial of due process of law; the right of the patients on whose behalf recoupment procedures were initiated and whose funds were being used as setoff funds to notice and the opportunity to be heard; the lack of any fair, reasonable notice to your petitioners of which claims were

disputed or on what grounds; the application of guidelines not in existence during most, if not all of the time periods involved; the use of prehearing recoupment procedures commencing in about June, 1971 when any "audit" was not started until 1974 or completed until the year 1976, and a hearing did not take place until the year 1978; the medical necessity of the care and the right to be reasonably compensated for same in the absence of guidelines for same, to mention some of the constitutional claims involved.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, U.S.C., Sections 1255 and 2101(c), Article III, United States Constitution, and the Fifth, Sixth and Seventh Amendments, U.S. Constitution.

A copy of the opinion as issued by the United States Court of Claims on September 17, 1982 is attached hereto at Appendix "D" and the letter of the denying the application of the petitioners for rehearing dated October 22, 1982 is attached hereto and made a part hereof as contained in Appendix "D".

A copy of the complaint originally filled in the United States District Court for the Central District of California containing the various constitutional claims of your petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic is attached hereto and made a part hereto and made a part hereof as contained in Appendix "A".

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AND REGULATIONS INVOLVED

Article III, United States Constitution, Title 42, U.S.C., Section 1395ff, Fifth, Sixth and Seventh Amendments, Title 28, Section 1491, 20 CFR, Part 405 as published in the Federal Register, Volume 37, No. 2, January 5, 1972, pages 89-91, as set forth below and in the appendices attached hereto are the involved provisions, to wit:

Article III of the United States Constitution provides:

"Article III, U.S. Constitution"

"Section 2, Clause 1. Subjects of jurisdiction."

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United

States shall be a Party;--to Controversies between two or more States;--between a State and and Citizens of another State;--between citizens of different States;--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Until 1972 Title 42 U.S.C., Section 1395ff(b) read as follows:

> "Any individual dissatisfied with any determination under subsection (a) of this section as to entitlement under Part A or Part B, or as to amount of benefits under Part A where the matter in controversy is $100.00 or more, shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, in the case of a determination as to entitlement or as to amount of benefits where the amount in controversy is $1,000 or more, to judicial review of

the Secretary's final decision after such hearing as provided in section 405(g) of this title."

Section 1395ff(b), however, was amended by the Social Security Amendments of 1972, Pub. L.No.92-603, Sec. 299(O)(a), 86 Stat. 1464 (1972) Section 1395ff(b) now provides:

Title 42 U.S.C., Section

"Section 1395ff. Determinations; appeals

(a) The determination of whether an individual is entitled to benefits under Part A or part B of this subchapter, and the determination of the amount of benefits under part A of this subchapter, shall be made by the Secretary in accordance with regulations prescribed by him.

(b)(1) Any individual dissatisfied with any determination under subsection (a) of this section as to--

(A) whether he meets the conditions of section 426 or 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of this subchapter, or section 1395i-2 of this title or section 1819, or

(C) the amount of benefits under part A of this subchapter (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) Notwithstanding the provisions of subparagraph (C) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

(c) Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services, or with any determination described in section 1395cc(b)(2) of this title, shall be entitled to a hearing thereon by the Secretary (after reasonable notice and opportunity for hearing) to the same extent as is provided in

section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

Aug 14, 1935, c. 531, Title XVIII, section 1869, as added July 30, 1965, Pub.L. 89-97, Title I, section 102(a), 79 Stat. 330 and amended Oct. 30, 1972, Pub.L. 92-603, Title II, section 2990(a), 86 Stat. 1464.

The Fifth Amendment of the United States Constitution provides in relevant part, to-wit:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF FACTS

Your petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic engaged in an extensive

geriatric practice providing medical care and treatment to many persons covered by the Medicare Act, Title 42, United States Code, Sections 1395 et seq., during the involved and disputed periods of 1967 through 1973 for which claims assigned to them were filed with the Medicare Administration.

For the performance of the involved medical services your petitioners accepted assignments of Medicare benefits and applied to Medicare for payment, pursuant to Part B of the Medicare Act. That portion pays for 80 percent of the approved amounts.

During approximately June, 1971 a letter was sent to Dr. Matanky and Corbin Medical Clinic purporting to be notice of review. It read as follows:

> "Dear Doctor Matanky, we have been requested by the Social Security Administration to withhold Medicare reimbursement to you pending the

completion of an investigation of your claims to determine whether or not an irregularity exists. We will notify you when a decision is reached by Social Security Administration."

Between the year 1967 and June, 1971 many claims were paid on after having been reviewed, adjusted and reduced before approval of the amount payable, and your petitioners accepted the adjusted and reduced amounts in the approximate sum of $51,000.00.

During June, 1971, the Medicare Administration commenced a prehearing recoupment of $51,000.00. Much later, during 1974, it commenced a second, further review and reduction or elimination of payment on claims previously reviewed and paid on as described above.

The second review and audit of the involved claims did not terminate until the year of 1976.

No hearing whatsoever on the claims being subjected to the recoupment procedure

occurred until the year 1978 within the Medicare Administration. (See transcript of hearing, October 25, 1978 as set forth in Appendix "G" attached hereto and incorporated herein as though fully set forth.

The funds later withheld for setoff were payments on different claims and many patients were not the same ones involved in the original payments out. No notice was given to the patients whose claims the Medicare Administration sought recoupment and refunds concerning, nor was notice given to the patients whose payments were being used as the setoff funds, as best as can be determined from the records herein that their bills were effectively unpaid. The patients were also not given the opportunity to apply for review themselves independently of your petitioners.

Your petitioners raised numerous consitutional level claims in both the adminstrative hearing on October 25, 1978 and in the paperwork

and briefing involved therewith, and they thereafter raised substantial, federal consitutional claims on applying for hearing and review of the administrative determinations confirming the recoupment when they filed their complaint in the U.S. District Court for the Central District of California (See Appendix "A", constituting the complaint, filed on December 21, 1978.

The above action was transferred to the U.S. Court of Claims by the U.S. District Court, pursuant to a determination in the Ninth Circuit entitled Drennan v. Harris, 606 F.2d 850 which provided for no further hearing in the U.S. District Court under the assumption that the U.S. Court of Claims had the jurisdiction to review constitutional claims.

After this matter was transferred to the U.S. Court of Claims the U.S. Government answered the complaint. (See Appendix "B", being the answer of the Government herein.)

Your petitioners had also sued Blue Shield of California in the U.S. District Court.

The above entitled matter was stayed by the U.S. Court of Claims pending the outcome of the determination in U.S. v.Erika, Inc., 72 L.Ed.2d 12. The action of your petitioners was dismissed by the U.S. Court of Claims on the U.S. Government's application, on September 17, 1982, and their petition for rehearing denied on October 22, 1982, by the U.S. Court of Appeals for the Federal Circuit, pursuant to the determination of U.S. V. Erika, Inc. (See opinion of the U.S. Court of Claims opinion and the letter denying rehearing, dated October 22, 1982, attached hereto in Appendices "D" and "F".

Your peitioners continuously raised various constitutional issues including their right to be heard by an independent, duly appointed federal judiciary and pursuant to Article III

of the U.S. Constitution and concerning substantial federal constitutional issues not addressed in either U.S. v. Erika, Inc., 72 L.Ed.2d 12 or Schweiker v. McClure, 72 L.Ed. 2d 1. (See your petitioner's complaint and opposition to vacating a magistrate referral, set forth in Appendices "A" and "C" attached hereto)

None of the federal constitutional issues raised by your petitioners, as far as they can discern, were determined by either U.S. v. Erika, Inc., 72 L.Ed. 2d 12, 101 S.Ct. , or by Schweiker v. McClure, 72 L.ed.2d 1, 101 S.Ct. .

Your petitioners are now squarely faced with and squarely present to this Court the issue of whether they may be entirely precluded from seeking federal judicial review of federal constitutional claims concerning federal administrative determinations by the U.S. Congress or by a federal administrative procedure delegated to private insurance carriers and their employees,

or whether such a system clearly denies them due process of law and access to the federal courts.

ARGUMENT

I

A CONSTRUCTION AND APPLICATION OF TITLE 42 U.S.C., SECTION 1395ff(b) (MEDICARE ACT) TOTALLY PRECLUDING ANY JUDICIAL REVIEW BY JUDGES DULY APPOINTED AND SITTING UNDER ARTICLE III, U.S. CONSTITUTION OF SUBSTANTIAL CONSTITUTIONAL CLAIMS CONCERNING PAYMENTS MADE PURSUANT TO THE MEDICARE ACT, PART B, IS INHERENTLY AND AS CONSTRUED AND APPLIED UNCONSTITUTIONAL AND A VIOLATION OF ARTICLE III, U.S. CONSTITUTION AND DUE PROCESS OF LAW AS PROVIDED FOR BY THE FIFTH, SIXTH AND SEVENTH AMENDMENTS, U.S. CONSTITUTION. (WEINBERGER V. SALFI, 422 U.S. 749; CALIFANO V. SANDERS, 430 U.S. 109, 95 S.Ct. 2457, 45 L.ed.2d 522; JOHNSON V. ROBISON, 415 U.S. 361, 94 S.Ct. 1160, 30 L. ed.2d 389.

Your petitioners Seymour R. Matanky and Corbin Medical Clinic have been completely

precluded from obtaining any judicial review of their various constitutional claims concerning Medicare Act, Part B claims.

The United States Court of Claims dismissed their action and complaint based on U.S. V. Erika, Inc., 72 L.ed.2d 12, 101 S.Ct. , holding that it did not have jurisdiction to consider any claim, whether the claim was constitutional in nature or not. It declined to transfer your petitioners' action back to the United States District Court for the Central District of California for hearing of the constitutional level claims, which is the transferring District Court. The transferring United States District Court had originally transferred the above entitled matter to the U.S. Court of Claims pursuant to a Ninth Circuit decision, Drennan v. Harris, 606 F.2d 850, which provided for the transfer on the basis that constitutional level claims could be adjudicated by U.S. Court of Claims as the Article III Court

having jurisdiction of same.

This Court is now squarely faced with the issue of whether the U.S. Congress may completely preclude adjudication of constitutional claims concerning Medicare Act, Part B by Article III Judges and Courts on the one hand, and whether Title 42 U.S.C., Section 1395ff(b) is inherently and as construed and applied unconstitutional and in violation of Article III, U.S. Constitution and the due process clause of the Fifth Amendment, U.S. Constitution where it is applied so that no adjudication by a federal judge can be obtained in any federal court in this country, of Medicare Act, Part B claims.

The U.S. Court of Appeals stated in Drennan v. Harris, 606 F.2d 850:

> "We must therefore consider whether Salfi would preclude the district court from hearing Drennan's constitutional claims based upon

section 1331. The Supreme Court has recognized that a statute precluding all review of constitutional claims would raise a serious question of the validity of the statute. Sanders, 430 U.S. at 109, 97 S.Ct. 980; Salfi, 422 U.S. at 762, 95 S.Ct. 2457; Johnson v. Robinson, 415 U.S. 361, 266-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) South Windsor Convalescent Home, Inc., 541 F.2d at 913; Gallo v. Mathews, 538 F.2d at 1150; Hazelwood Chronic and Convalescent Hospital, 543 F.2d at 707.

"This question was raised in a case similar to the present case in the Fifth Circuit, Dr. John T. MacDonald Foundation v. Califano, 571 F.2d 328 (5th Cir. 1978). There the court, sitting en banc, held that section 405(h) which is incorporated into

section 1395ii of the Medicare Act, does preclude all review of the Secretary's decisions by the federal district courts brought under section 1331, including constitutional claims. However, the Court there held that the difficult question of whether all judicial review of constitutional claims may be foreclosed is avoided, since jurisdiction has been held by the Court of Claims to exist in that court. Whitecliff, Inc. v. United States, 536 F.2d 347, 210 Ct.Cl. 53 (1976). The Fifth Circuit in MacDonald, thus remanded the case to the district court to dismiss with directions to transfer the cause to the United States Court of Claims. 571 F.2d at 332. This procedure has been approved and followed by our court. Sierra Vista Hospital, Inc. v. Califano, 597

F.2d 200 (9th Cir. 1979).

We find that the disposition suggested by MACDonald is the proper one. Accordingly, we remand this case to the district court with instructions to dismiss and transfer the cause to the court of claims."

The U.S. Court of Appeals for the Sixth Circuit concluded in Chelsea Community Hospital v. Michigan Blue Cross, 630 F.2d 1131 at 1135 (1980):

"We adopt the view of the Court of Claims, for it is a 'cardinal principle' that we should seek statutory constructions which avoid constitutional doubts, Johnson v. Robison, supra, 415 U.S. at 366-67, 94 S.Ct. 1165; St. Louis Univ., supra, 537 F.2d at 291. It would raise grave constitutional doubts if we held that the Secretary had unreviewable

discretion in reimbursing Medicare providers, particularly if this discretionary authority was delegable to private parties. See United States v. Aquavella, 615 F.2d 12, 18 (2d Cir. 1979); South Windsor, supra, 541 F.2d at 913."

II

WHERE THE MEDICARE ADMINISTRATION INSTITUTED A PREHEARING RECOUPMENT PROCEDURE IN JUNE, 1971, DID NOT BEGIN ITS REVIEW AND AUDIT UNTIL 1974 WHICH WAS NOT COMPLETED UNTIL 1976 AND THEN DID NOT CONDUCT HEARINGS UNTIL THE YEAR 1978, PREHEARING RECOUPMENT WAS A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT, U.S. CONSTITUTION.

The rapidity of administration review is a significant factor in assessing the constitutional sufficiency of the entire process. It can hardly be said that a recoupment of $51,000.00 in June, 1971 concerning which a review by the

Medicare Administration is not commenced at all until 1974, completed in 1976 and not scheduled for even administrative hearings in any way until 1978 is rapid. (Goldberg v. Kelley, 397 U.S. 254, 25 L.Ed.2d 2287, 90 S.Ct. 1011 (1970))

This Court stated in Fusari v. Steinberg, 419 U.S. 379 at 389, 42 L.ed.2d 521 at 529, 95 S.Ct. 533:

> "Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action. Cafeteria Workers v. McElroy, 367 US 886, 895, 6 L Ed 2d 1230, 81 S Ct 1743 (1961); Goldberg v. Kelly, 397 US at 263-266, 25 L Ed 2d 287, 90 S Ct 1011. As the Court recognized in Boddie v Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 91 S Ct 780 (1971): 'The formality and procedural requisites for [a due process] hearing

can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests. Cf. Arnett v Kennedy, 416 US 134, 168-169, 40 L Ed 2d 15, 94 S Ct 1633 (opinion of Powell, J.); id., at 190, 192, 40 L Ed 2d 15 (White, J., concurring in part and dissenting in part). Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the

entire process."

It is clear that there was an extreme delay and withholding of funds during the administrative audit which was delayed and did not even begin for about three years after the June, 1971 letter.

Your petitioners were entitled to a prompt review of any claims by the Government that funds should be reimbursed to the Medicare Administration. Because the claims involved people who were ill and elderly, rapidness of review was essential. Many of the patients had little time left in this world. The need for continuous medical attention was essential to their survival and there was likely to be an even greater impact on the quality of due process substantial if time lapses occurred in the hearing and determination processes.

In California there is a five-year statute requiring that a matter be brought to trial

within five years of the time that it is filed. Criminal cases now have much shorter time periods within which they must be brought to trial.

Yet, here there was a seven-year delay before a hearing was held. Such a delay hardly comports with due process of law when $51,000 in earnings is withheld from a person. This is a substantial amount of money by anyone's standards.

III

BY IMPLEMENTATION OF RULES AND REGULATIONS ON A RETROACTIVE BASIS WHERE THE MEDICARE ADMINISTRATION HAD REVIEWED, REDUCED AND PAID ON CLAIMS, IT INTERFERRED WITH THE CONTRACTUAL OBLIGATIONS BASED ON ACCORDS AND SATISFACTIONS IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT, U.S. CONSTITUTION

Legislation which impairs the obligation of contract is unconstitutional and a violation of the provisions of the Fifth Amendment, U.S.

Constitution (Lynch v. United States, 292 U.S. 571)

The Medicare Administration sought to apply rules and regulations which it propounded in 1971 to prior courses of conduct of your petitioners in doing work where there had been no rules or regulations outlining medical services it would provide for payment on. It had previously entered into accords and satisfactions of the claims by adjudicating, disputing and paying on them. (Union Pacific R. Co. v. United States, 99 U.S. 700, 25 L.ed. 496, 501 (1879)) The funds involved were and are property owned by your petitioners which the Medicare Administration took without adequate compensation.

Rights arising out of contracts with the United States are protected against action by it under the due process clause of the Fifth Amendment. Thus, in 1934 the Supreme Court through Justice Brandeis stated in Lynch v.

United States (1934) 392 U.S. 571, 781 L.3d 1434, 1440, 54 S.Ct. 840:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

Congress is completely without power to abrogate contractual obligations of the United States. In 1879 the Supreme Court stated in Union Pacific R. Co. v. United States, 99 U.S. 700, 256 L.ed. 496, 501 (1879):

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all

the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

California law on accords and satisfaction is as follows:

California Civil Code defines an accord as follows:

> "An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.' (C.C. 1521.)

California Civil Code defines a satisfaction as follows:

> "Acceptance, by the creditor, of the consdieration of an accord extinguishes the obligation, and is called satisfaction." (C.C. 1523.)

In other words, an accord substitutes a new executory contract

for a previously existing contract or debt, the usual purpose being to settle a claim at a lesser amount. (B. & W. Engineering Co. v. Beam (1913) 23 C.A. 164, 137 P. 624.) And, since an accord is an executory contract, it must be based upon a valid consideration. (Shortell v. Evans-Ferguson Corp. (1929) 98 C.A. 650, 277 P. 519; see Rest., Contracts section 417; 1945 A.S. 685; 1946 A.S. 630; 24 A.L.R. 1474; 62 A.L.R. 751.)

IV

ESTOPPEL AND THE VARIOUS OTHER DUE PROCESS ISSUES INVOLVED HEREIN WERE ISSUES OF FACT CONCERNING WHICH THE PETITIONERS WERE ENTITLED TO HAVE EVIDENTIARY HEARINGS BY ARTICLE III COURTS, AND WHICH WERE CONSTITUTIONAL FACTUAL ISSUES WHICH COULD NOT BE RESOLVED ON AN AT LAW MOTION TO DISMISS WITHOUT THE TAKING EVIDENCE.

The U.S. Court of Claims dismissed all of the constitutional factual claims of your petitioners, without any taking of evidence on them at all, by way of a non-evidentiary proceeding.

Your petitioners respectfully submit that such an approach to constitutional claims reduces the involved constitutional issues to a mere series of utterances which have no substantial meaning or enforceable validity in our legal system.

Your petitioners respectfully submit that issues of estoppel and the application of a statute of limitations barring recoupment by

the Medicare Administration are constitutional, factual issues to which they are entitled to be accorded evidentiary proceedings. (U.S. v. James Stewart Company, 336 F.2d 777, 779 (9th Cir., 1964)

But estoppel and the application of a statute of limitations were not the only factual issues raised to which your petitioners were entitled to evidentiary hearings. They asserted that the Government had entered into accords and satisfactions with them. They asserted protracted delay in providing for a hearing after recoupment occurred.

In Leone v. Aetna Cas. & Sur. Co., 599 F.2d 566, 567 (3rd Cir., 1979), the Court stated, citing this U.S. Supreme Court:

> "It is essential to emphasize at the outset that we are dealing with a judgment entered on the face of the complaint without affidavits and without discovery.

> It is the settled rule that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). See also Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972).[1] The question to be answered thus becomes whether the assertions of the complaint, given the required broad sweep, would permit adduction of proofs that would provide a recovnized legal basis for avoiding the statutory bar."

In Cooper v. Bell, 628 F.2d 1208, 1214, in talking of non-evidentiary dismissal concerning a bar to the complaint based on a statute

of limitations, the Court held that the plaintiff was entitled to be heard in evidentiary proceedings as to whether he was barred, and stated as follows:

> "We now turn to Cooper's specific allegation that the government should be estopped--by Holder's misrepresentation and by Cooper's reliance on Holder's advice--from raising Cooper's failure to file a timely charge. We appreciate the trial judge's astonishment at Cooper's allegation that he had relied on another's interpretation of EEO regulations with which Cooper's duties as an EEO officer should have made him quite familiar. Nevertheless, we cannot say that, as a matter of law, Cooper would not prevail were he able to adduce sufficient evidence to substantiate the allegation

Accordingly, it was improper to dismiss at this stage, because dismissal foreclosed Cooper from any opportunity to prove his case. See Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)."

It is respectfully submitted that it was equally improper for the U.S. Court of Claims to have dismissed your petitioner's complaint and action.

V

THE INSTITUTION OF RECOUPMENT PROCEDURES WELL AFTER ANY APPLICABLE STATUTE OF LIMITATIONS RESULTED IN A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT, U.S. CONSTITUTION.

Where a statute of limitations is expanded in such a way as to result in the deprivation of substantial property rights, a violation of due process of law as guaranteed by the Fifth

Amendment, U.S. Constitution results. (Campbell v. Holt, 115 U.S. 620, 29 L.Ed. 483; Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 89 L.Ed. 1628)

Here both a lapse of time vested your petitioners with a settled property right and prejudiced them by the ability of the U.S. Government to recoup.

Your petitioners incorporate herein by reference as part of their argument their questions presented at the beginning of this petition and their complaint attached herein as Appendix "A".

WHEREFORE, your petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic pray that this Honorable Court grant their petition for writ of certiorari, granting them a hearing on this petition for writ of certiorari, and thereafter reverse and remand the above entitled action for hearing and determination at evidentiary proceedings before a federal judge duly

appointed pursuant to Article III, U.S. Constitution, and award your petitioners reasonable attorneys fees and costs herein.

Dated: January 18, 1983

Respectfully submitted,

JOAN CELIA LAVINE
Attorney for Petitioners

MORRIS LAVINE
617 South Olive St., Suite 510
Los Angeles, California 90014
Telephone: (213) 627-3241
Attorney for Plaintiffs
Seymour R. Matanky and
Corbin Medical Clinic

F I L E D
Dec. 21, 1978
U.S. District Court
Central District of
California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SEYMOUR R. MATANKY and CORBIN MEDICAL CLINIC, Plaintiffs, vs. JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE; and BLUE SHIELD OF CALIFORNIA, a corporation, Defendants.	CASE NO. 78 4887 WPG(K) COMPLAINT AND PETITION FOR REVIEW OF FINAL DECISION OF SECRETARY OF HEALTH, EDUCATION AND WELFARE RE WITHHELD FUNDS BY BLUE SHIELD OF CALIFORNIA

Come now plaintiffs Seymour R. Matanky and Corbin Medical Clinic and for their complaint and petition for review of final decision of Secretary of Health, Education and Welfare concerning funds withheld by Blue Shield of California allege as

follows:

I

This is an action to review a final decision of the Secretary of Health, Education and Welfare of the United States of America. This Court has jurisdiction of the action under Sec. 205 (g) of the Social Security Act, as amended (Title 42 U.S.C. Sec. 405 (g)).

II

Plaintiff, Seymour R. Matanky, is and has been at all times metioned herin, a resident and citizen of the State of California, residing at 19701 Arundel Place, Woodland Hills, California in the County of Los Angeles. He was duly licensed to practice medcine at all times pertinent herein in California.

The plaintiff Corbin Medical Clinic is a medicial clinic owned and operated by Seymour R. Matanky at all times pertinent herein and located at 19625 Ventura Blvd., Tarzana, California in the County of Los Angeles, and duly licensed in California.

The defendants are Joseph A. Califano, Jr., Secretary of Health, Education and Welfare and Blue Shield of California, a corporation.

Plantiffs contend that the defendants have wrongfully withheld $51,316.14 since June 15, 1971 in violation of plainitts' constitutional rights to due process of law and equal protection of the laws, and these sums are presently due and owing to him plus interest at the rate of seven percent per annum.

III

The plaintiff CORBIN MEDICAL CLINIC is located at 19625 Ventura Boulevard, Tarzana, California.

IV

Dr. Matanky was admitted to practice medicine in the State of Illinois in 1950, and subsequently joined the Medical Corps of the U.S. Army as a 1st Lieutenant and practiced for two years in Korea and Japan, and was subsequently discharged.

He was licensed to practice medicine in the State of California in 1954, and in 1957 he became

an assistant at the County General Hospital to Roger Egeberg, M.D., who was the Medical Administrator for Health, Education & Welfare. Dr. Matanky attended a large number of elderly patients at the County General Hospital for a period of nine years, becoming highly experienced and knowledgeable about their necessary needs for medical attention and an expert in that field.

Commencing in 1965, Dr. Matanky became engaged in attending the sick and the elderly in hospitals, skilled nursing homes, and rest homes located in the San Fernando Valley, consisting of various towns and cities in that area, to-wit: Encino, Tarzana, Sherman Oaks, Woodland Hills, Canoga Park, Reseda, etc., and made himself available at all times for all medically necessary needs of the area.

V

At the time of Dr. Matanky's commencement of his medical services, and for a period of years until 1972, there were no guidelines set up under the

Medicare program that informed the Doctor when he should render his services, nor limit to how many visits he could make to the facilities, and under what conditions these patients were entitled to treatment by Dr. Matanky as a medical necessity. The doctor, as a physician, was required to see and attend each patient in accordance with his best medical judgment.

VI

Each patient seen and given medical treatment and attention by the doctor was required to fill out and sign a contract in the form of a claim provided by Blue Shield and the Social Security Administration, and its Medicare section, and each claim form was separate contract and separately assigned to Dr. Matanky only on a place on the form provided for the assignment of the contract in the claim, "to the party who accepts assignment below." The party below named was Seymour R. Matanky, M.D., 19625 Ventura Boulevard, Tarzana, California 91356; no other provision was contained in the contract of assignment.

VII

As Dr. Matanky received these assignments from the patients who he saw and served, he turned them into Bule Shield, who processed them and reduced the amount claimed according to their determination that the services had deen duly rendered, and the charges were fair and reasonable and proper. Thereafter, they issued their check to Dr. Matanky, and Dr. Matanky received the same and accepted the reduced amount. This constituted an Accord and Satisfaction. (1 C.J.S. Sec. 34, 528; C.C.P. Sec. 1523; Williston on Contracts, revised, vol. 6, Sec. 1856, p. 5220; Silver v. Grossman, 183 Cal. 696; Grayhill Drilling Co. v. Superior Oil Co., 39 Cal.2d 751.)

VIII

In 1971, Medicare, for the first time, adopted guidelines and regulations limiting the number of visits which doctors could make to these facilities, effective in 1972. On June 15, 1971, Dr. Matanky received a letter from the supervisor of the program

integrity Medicare liaison stating that they had been requested by the Social Security Administration to withhold Medicare reimbursement pending completion of investigation ot determine whether or not any irregularity exists. They further stated that, "... We wil notify you when a decision is reached by S.S.A."

IX

No notice was given, nor hearing called, as required by due process of law guaranteed by the Fifth Amendment to the Constitutionn of the United States (Goldberg v. Kelly, 397 U.S. 254, 25 L.ed.2d 287), to determine any rights or any cause for withholding the funds.

X

On demand of Dr. Matanky for a Fair Hearing before an Administrative Judge, a hearing date was granted on August 7, 1978, at Los Angeles, California, before the Honorable Nahman Schochet, Medicare Hearing Officer, selected and employed by Blue Shield.

XI

On August 7, 1978, a hearing was held by the Blue Shield Hearing Officer, the Honorable Nahman Schochet, at which time Dr. Matanky was present with his counsel, and Blue Shield and the Secretary were represented by the law firm of Hazzard, Bonnington, Rogers & Huber, and John I. Jefsen; and Blue Shield by Claude Molaison, and by Dr. Julius Sherr, medical advisor.

XII

The sole issue presented by Blue Shield was the lack of medical necessity for the various visits.

The Fair Hearing case number was 78268, originally 77042.

XIII

The claimants, Dr. Matanky and Corbin Medical Clinic, raised several constitutional violations of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs contended that Dr. Matanky entered into a good faith contract through the insurance carrier Blue Shield, and Joseph A. Califano, Jr., Secretary of Health, Education & Welfare, to render

all services medically necessary that were required, and submit the claims signed by the Beneficiaries for payment. That the rights were contractual and protected by the Due Process Clause of the Fifth Amendment to the Constitution of the United States. They contended further it's a violation of due process of law to deprive an individual of previously vested contractual rights.

Claimants further contend that Blue Shield and its peer reviewers examined all claims and reduced them from a total of $81,901.48 to $51,316.14 as a settlement and an Accord and Satisfaction of the amount due to the doctor and his patients for their medical services, and that Dr. Matanky had forgiven approximately $30,000.00 as consideration for the Accord and Satisfaction, and the amount that Blue Shield did pay was accepted at the time and waived any possible irregularities in the form of the claims, or the data supplied on them.

XIV

Claimants also raised the denial of due process

of law in failure to give Dr. Matanky or Corbin Medical Clinic fair notice, or any notice, or hearing regarding the withholding of funds.

XV

They also raised the question of the bar of the statute of limitations, which was limited to a three-year period of time. Provider appealed Decision 00-76-12, also 20 C.F.R. Sec. 405, 1885.

XVI

Claimants further raised the points that the first decision rendered was res judicata.

XVI

Claimants maintain that the monies withheld are monies that were being paid for the care of other patients than those for services for patients already cared for and paid, and that neither Blue Shield nor the government had a right to convert those payments to pay previously considered claims, and that it was conversion by Blue Shield.

XVII

Dr. Matanky testified that he made the visit

and rendered the services and that they were medically necessary. There was no contradiction or rebuttal at the hearing. No good cause was shown for any redetermination. See 20 C.F.R. Sec. 1481.

Dr. Sherr was called by Blue Shield to testify. He said that he did not practice in the same area as Dr. Matanky. He further admitted that he had not talked to any of the patients personally or diagnosed any of them. The doctor testified that the basis for payment generally for more than one visit per month was adequate documentation (Blue Shield had waived any defect in documentation by an accord and satisfaction). He further testified that he did not start looking at the claims involved until 1974, and the claims that he looked at were current claims. He was not qualified and his opinion should be disregarded. Moore v. Belt, 34 Cal.2d 525; Bennett v. Los Angeles Tumor Institute, 102 Cal. App.2d 293; Huffman v. Lindquist, 37 Cal.2d 465.

Other issues raised by claimant are:

(1) Whether Blue Shield could withhold payment due to Dr. Matanky for service rendered on new and different individual contracts as recoupment of money paid to him for other patients.

(2) The failure to notify the original claimants, the new claimants, and the doctor, specifically what was claimed and what specific facts are relied on to reopen the claims, and whether such failure constituted a denial of due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

(3) Whether the withholding of payment from Dr. Matanky constituted impairment of contract, protected by the Fifth Amendment to the Constitution of the United States, and constituted a bill of attainder and ex post facto law in violation of the Constitution of the United States.

(4) No notice was given to Dr. Matanky or to the patients whose subsequent or past claims were

involved that Blue Shield was seeking a readjustment of the claims allowed and/or paid concerning the fact that the Blue Shield was claiming the right to withhold funds claims for other services as reimbursement to itself for monies paid years past. (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865; Armstrong v. Manzo, 380 U.S. 545, 94 L.Ed.2d 62.)

XIX

The hearing on August 7,1978, resulted in a decision by the Hearing Officer as follows:

> "Accordingly, it is the decision that of the $50,889.82 now withheld by the carrier:
>
> "$50,518.22 is to be applied to satisfaction of the refund due the government on the reviewed claims; and
>
> "$371.60 overwithholding is to be refunded to the claimant;
>
> all pursuant to Title XVIII of the Social Security Act, as amended, and regulations

and rules duly adopted thereunder."

XX

The Hearing Officer advised that his decision was final and the final judgment of Health, Education & Welfare. Nevertheless, we filled a petition for rehearing which the Hearing Officer informed us he would consider. Nevertheless, we are filing this petition to review within the 60 days allowed by Section 205 (g), Title 18 of the Social Security Act, as amended. We attach a copy herewith of the Decision of the Hearing Officer and we ask the Court to request the Secretary of Health, Education & Welfare and the Medicare Hearing Officer and Blue Shield of California to furnish the Court and counsel with a certified copy of the decision of the Hearing Officer of the Petition for Rehearing and any decision on the Petition for Rehearing. We also ask the Court to order the Secretary of Health, Education & Welfare and the Hearing Officer and Blue Shield of California to furnish the Court

with a certified copy of the tape recording verified by the Hearing Officer as a true and correct copy of the proceedings conducted before him on August 7, 1978.

WHEREFORE, Plaintiffs-Claimants respectfully petition this Court to review and reverse the judgment of the Hearing Officer denying the claims of the Plaintiffs-Appellants, and order judgment entered against Joseph A. Califano, Jr., Secretary of Health, Education & Welfare, the United States of America, and Blue Shield of California for the amount of $51,316.14, plus interest at 7% per annum since June 15, 1971.

DATED: December 19, 1978.

Respectfully submitted,

MORRIS LAVINE
Attorney for Planitiffs-Claimants
SEYMOUR R. MATANKY and
CORBIN MEDICAL CLINIC

NAHMAN SCHOCHET
MEDICARE HEARING OFFICER
Two North Point
San Francisco, CA 94133

October 25, 1978

Joan Celia Lavine, Attorney
617 South Olive Street, Suite 510
Los Angeles, CA 90014

Re: Seymour R. Matanky, M.D.

Payment Review (PARE) on multiple beneficiaries services May 1969 through June 1973, with beneficiaries' names, HIC numbers, and claim control numbers in the record exhibits and accounts.

Amount in controersy at hearing request: net Medicare refunds due of $50,889.82 (the net 80% paid on the total reviewed overallowances).

FAIR HEARING CASE NUMBER 78268 (originally 77042)

On August 7, 1978, hearing was duly held at Los Angeles, California pursuant to Part B, Title XVIII of the Social Security Act, as amended, and regulations, policy and guidelines duly adopted thereunder. The participants were:

claimant in person; his attorney/representative, Ms. Joan Celia Lavine, of the Morris Lavine and Joan Celia Lavine Law Office; Mr. Claude Malaison, representative of the carrier, Blue Shield of California; Mr. John I. Jefsen of the Law Office of Hassard, Bonnington, Rogers & Huber, the carrier's attorney; and Doctor Julius Sherr, M.D., a medical advisor who reviewed the claims and files herein for the carrier.

The record herein consists of:

Exhibit A, the original file and claim accounts, previously furnished claimant and his attorneys. Included are the claims from May 1967 through June 1973 (in 65 different months) which were questioned. Also included herein is an additional August 7,1978 letter with 15 pagers of Committee Case Computations attached to the Administrative Review Decision of September 30, 1976 mailed to Doctor Matanky (the claimant),

and to be associated with pages 16-18 of the file (Exhibit A).

Exhibit B: Carrier's 4 page June 1, 1970 Medicare Bulletin; Part B Intermediary Letter Number 70-32, Number 70, pages B5 through B9; and carrier's January 1971 Medicare Bulletin pages 10 and ff.

Exhibit C: 2 page May 1974 letter from Roy F. Nilsson, Program Evaluation Branch, to the carrier's director of Medicare Liaison and Hospital Review.

Exhibit D: Copy of December 4, 1969 letter, carrier's medical advisor to claimant regarding patient Edward Kurakowski.

Also subsequent pertinent correspondence, and attorney's briefs, with the hearing transcript.

The record herein was not closed as ready for decision until October 13, 1978, when

Morris Lavine's Repy Brief was received by the undersigned.

The hearing, unduly delayed for varied causes, was to furnish claimant his requested opportunity to explain his position herein with such additional evidence as was pertinent and not already on file to support his claim. It should be noted that the claims reviewed are not only in claimant's name alone, but may also be in his name d.b.a. or as successor to the Corbin Medical Clinic.

Claimant alleges that monies withheld by the carrier for Medicare services are due him without any further adjustment for alleged over-allowances resulting in the alleged overpayments.

HISTORY/BACKGROUND

Medicare reimbursements to claimant were withheld since June 1971 at direction of the Social Security Administration, Bureau of Health Insurance (now: Health Care Financing Admini-

stration, Medicare Bureau). The carrier was also directed to perform a post payment review of all claimant's services between 1967 and 1973 rendered in Skilled Nursing Facilities etc. The resulting determination was that claimant had been overpaid (net) $51,316.14, following review of 2,412 claims for 305 Medicare beneficiaries in Skilled Nursing Facilities, Nursing Homes, and Guest Homes; $1,634.72 withheld over that amount was paid claimant with an August 25, 1975 letter (Exhibit A, page 12). Since then the files have been rereviewed and reevaluated.

An Administrative Review was the next step, which reported net Medicare overpayment of $50,889.82, which is the amount in controversy herein, being the net anount of payments already withheld and required to properly adjust the Medicare payments made to claimant on the claims reviewed in this proceeding. $425.32 was refunded to claimant to keep the amount withheld to $50,889.82. (Exihibit A, pages 16-17-18).

The purpose of this proceeding is not to check on claimant's medical or professional ability. The object is to see that Medicare payments were not made in violation of Medicare rules and regulations. Such overallowances, followed by erroneous overpayments, resulted mainly from causes as:

Using the wrong RVS procedure number indicating a greater allowance due than is proper.

Insufficient or no documentation (which must accompany each claim) to justify larger than normal allowances either for certain medical or surgical procedures or for more than the normal limit of one visit a calendar month to a patient with a chronic fairly stabilized condition in a nursing home or such institution. Or "Only patient seen" omitted when required to be stated if billed for any procedure greater than #90341/#90441; otherwise allowable as #90341/#90441.

In case of multiple routine calls made in an exteded care facility, nursing home or guest home, the physician may charge as for a home visit for the first patient seen, and procedure #9018 (#90341) for for each additional patient; but the claimant must state thereon which one was the "First Patient Seen."

Claimant was advised at least as early as June 15, 1971 that, pursuant to request of the Social Security Administration, Medicare reimbursements were being withheld pending audit investigation (Exhibit A, page 1).

Claimant's attorneys have been involved herein at least since their May 3, 1974 inquiry found at page 2 of Exhibit A. (See also, in Exhibit A, pages 3-4; 20-21-22; and August 7,1978 letter with attachments.)

(Number of Claims Involved.) The original review was of 2,412 claims for 305 beneficiaries,

and the remaining reviewed claims then excluded from further consideration. During the administrative review and additional 29 claims were excluded from consideration. There thus remained 1,137 claims for 167 beneficiaries.

(Amount in Controversy Summary.) The original net overpayment reported was $51,316.14 and $1,634.72 overwithheld refunded on August 29, 1975. Then the administrative review reported the net overpayment due as being $50,889.82 and an additional $425.32 refund in October 1976. (With the hearing request claimant supplied some additional papers causing another recalculation, reducing the amount in controversy to $50,518.22, leaving an apparent $371.60 still due claimant as of the hearing date.)

Exhibit C, a May 1974 letter, reports that certain civil claims of the United States against claimant had been settled, precluding recoupment of money for the 46 claims included in the indictment. It was stated that this did not preclude

"recouping any overpayments made on other claims for Skilled Nursing Facility visits submitted by Doctor Matanky from 1966 ..." "We have notified Mr. Lavine (Doctor Matanky's attorney) and Doctor Matanky that the monies being held cannot be released until the Medicare overpayment on assigned claims is computed . . . The 46 claims included in the indictment should not be considered in arriving at the overpayment."

FINDINGS

Based upon careful review and consideration of the record herein, it is found as follows:

1. The hearing request herein was in the alternative: (a) for honoring an alleged "accord and satifaction" of refunds due from claimant in the amount $51,316.14, allegedly paid by claimant to carrier for the government; or (b) for the over $81,000.00 originally billed in the reviewed claims.

2. This entire proceeding follows the administrative review determination that claimant owed the government a refund of Medicare net overpayments amounting to $51,316.14 (which claimant alleges he agreed to).

3. There is no proof that claimant refunded this $51,316.14; this amount was withheld pending the government directed audit; and most of it is still withheld by the carrier.

4. The $51,316.14 originally claimed due from claimant (and alleged by him as subject to "accord and satisfaction") was upon rereview and reevaluation reduced to $50,889.82, but is stil withheld.

5. Upon additional documentation furnished later, another rereview and reevaluation reports the net refund due as being $50,518.22.

6. Claimant has furnished general information and opinion regarding some details of his pratice, but no additional information referring to specific claims as required by Medicare ground

rules, policies and regulations.

7. Upon this set of facts and state of the record, it appears that claimant has in reality been contesting the additional reductions of the amount he owed on the reviewed claims, and which he owed on the reviewed claims, and which he agreed was due therfor by adjustment.

8. In view of the above, and the proceedings being based upon the alleged accord and satisfaction which was the withholding or repayment of the first refund amount of $51,316.14, this decision is not discussing the other arguments presented by claimant and counsel.

9. $50,518.22 is the refund amount now due the government from withheld moneys.

10. $371.60 overwithholding is to be refunded to the claimant.

DECISION

Accordingly, it is the decision that of the $50,889.82 now withheld by the carrier:

> $50,518.22 is to be applied to satisfaction of the refund due the government on the reveiwed calims; and
>
> $371.60 overwithholding is to be refunded to the claimant;

all pursuant to Title XVIII of the Social Security Act, as amended, and regulations and rules duly adopted thereunder.

Nahman Schochet
Medical Hearing Officer
(415) 445-5662

NS:dm

cc: Blue Shield of California
Attorney John Il Jefsen
Doctor Seymour R. Matanky

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES) ss.

I, the undersigned, say:

I have read the foregoing PETITION FOR REVIEW OF FINAL DECISION OF SECRETARY OF HEW RE WITHHELD FUNDS BY BLUE SHIELD OF CALIF. and know its contents.

/X/ CHECK APPLICABLE PARAGRAPH

/X/ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

/ / I am / / an officer / / a partner ____

/ / _____of _____

a party to this action, and am authorized to make this verification for and on its bdhalf, and I make this verification for the reason. I am informed and believe and on that ground allege that the matters stated in it are true.

/ / I am on of the attorneys for _____

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of the party for the reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on December 19, 1978 at Los Angeles California.

I declare under penalty of perjury that the foregoing is true and correct.

SEYMOUR R. MATANKY

IN THE UNITED STATES COURT OF CLAIMS

SEYMOUR R. MATANKY and CORBIN MEDICAL CLINIC,	)	F I L E D
	)	Dec. 10, 1980
Plaintiffs,	)	Court of Claims
v.	)	No. 67-80C
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S ANSWER

For its answer to plaintiff's petition, defendant admits, denies and avers as follows:

1. The allegations contained in sentence one of Paragraph I constitute plaintiff's characterization of the suit requiring no response. The allegations contained in sentence two constitute conclusions of law requiring no response; however, to the extent that they may be deemed allegations of material fact, they are denied.

2. Denies the allegations contained in sentences one through three of Paragraph II for lack of knowledge or information sufficient to form a belief as to the truth thereof, except

that, pursuant to Rule 33, defendant avers that plaintiff lacks capacity to sue. Denies the allegations contained in sentence four and states that the defeendant herein is the United States of America. Denies the allegations contained in sentence five.

3-4. Denies the allegations contained in Paragraphs III through IV for lack of knowledge or information sufficient to form a belief as to the truth thereof.

5. Denies the allegations contained in sentence one of Paragraph V. Denies the allegations contained in sentence two for lack of knowledge or information sufficient to form a belief as to the truth thereof.

6. Denies the allegations contained in Paragraph VI for lack of knowledge or information sufficient to form a belief as to the truth thereof, except admits that medicare beneficiaries must file a claim or a doctor may file such a claim pursuant to an assignment from the beneficiary.

7. Denies the allegations contained in sentences one and two of Paragraph VII for lack of knowledge or information sufficient to form a belief as to the truth thereof, except admits that Dr. Matanky received assignments and Medicare payments on some of these assignments. The allegations contained in sentence three constitute conclusions of law requiring no response; however, to the extent that they may be deemed allegations of material fact, they are denied.

8. Denies the allegations contained in sentence one, except admits that by 1970 Medicare had adopted guidelines concerning doctors' visitations. With respect to the allegations contained in sentences two and three, defendant admits that the referenced letter dated June 15, 1971, was sent to Dr. Matanky. Defendant states that such letter is the best evidence of its contents and denies any of plaintiffs' references thereto which do not conform to the contents of that letter.

9. Denies the allegations contained in Paragraph IX and states that notice and hearing were given in accordance with 42 CFR Section 405.801 et seq.

10. Admits the allegations contained in Paragraph X.

11. Admits the allegations contained in Paragraph XI, except denies that the Secretary was a party or represented by counsel.

12. Admits the allegations contained in Paragraph XII.

13-18. The allegations contained in Paragraph XIII through XVIII contain plaintiffs' characterization of their postition at the administrative level and as such, require no response. However, to the extent that any response may be required, defendant states that the administrative record to which plaintiffs refer is the best evidence of its contents and to that extent, defendant denies any of plaintiffs' references thereto which do not conform to such record.

19. The allegations contained in Paragraph XVIV constitute plaintiffs' characterization of the administrative decision and as such, require no response. However, to the extent that any response may be required, defendant states that the administrative record to which plaintiffs refer is the best evidence of its contents and to that extent, defendant denies any nonconforming reference thereto.

20. The allegations contained in sentences one and two of Paragrpah XX constitute plaintiffs' characterization of portions of the administrative record and as such, require no response. However, to the extent that any response is required, defendant states that the administrative record is the best evidence of its contents and defendant denies any nonconforming reference thereto. Denies the allegations contained in sentence three. Sentences four and five of plaintiffs' petition require no response.

21. Denies that plaintiffs are entitled to the relief sought in the final paragraph of their petition or any other relief arising from allegations contained in plaintiffs' petition.

22. Defendant denies each and every allegation in the petition not heretofore admitted, denied, or otherwise qualified.

FIRST AFFIRMATIVE DEFENSE

23. This Court lacks subject matter jurisdiction over plaintiffs' claim.

SECOND AFFIRMATIVE DEFENSE

24. Plaintiffs' petition fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

25. In Fair Hearing Case No. 78268, the Medicare Hearing Officer upheld the action of the Social Security Administration in directing the withholding of certain Medicare reimbursements to plaintiff Matanky since June 1971. Such withholdings, in the amount of $50,518.22, were held to have been properly offset against Dr.

Matanky's obligation to the United States arising out of his receipt of erroneous overpayments under the program. A copy of the decision is attached to the petition. Such decision is final and binding upon plaintiff Matanky in this action (and upon plaintiff Corbin Medical Clinic to the extent such clinic is a proper party having an identity of interest with plaintiff Matanky) since the decision is not arbitrary or capricious and is supported by substantial evidence. (42 CFR Section 405.835.) Accordingly, defendant is entitled to judgment that plaintiffs' claims are barred by offset in the amount of $50,518.22.

FOURTH AFFIRMATIVE DEFENSE

26. To the extent plaintiffs seek to recover more than the $50,518.22 determined by the Hearing Officer to be due the United States, such claim is barred by the fact that such express amounts have been paid to plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

27. Plaintiff Corbin Medical Clinic is not a proper party to this action.

WHEREFORE, defendant prays that plaintiffs' petition be dismissed and that defendant be granted such other and further relief as may be just and proper.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SEYMOUR R. MATANKY and CORBIN MEDICAL CLINIC, Plaintiffs, vs. JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION & WELFARE; and BLUE SHIELD OF CALIFORNIA, a Corporation, Defendants.	No. CV 78-4887-WPG(K) OPPOSITION TO MOTION TO VACATE REFERRAL, AND INSTEAD TO MAKE A RECOMMENDATION TO THE DISTRICT JUDGE FOR A HEARING BY THE DISTRICT JUDGE, OR THE COURT OF CLAIMS Hearing: February 16, 1979 Time: 10:00 A.M. Before: Magistrate Kronenberg

TO ALL PARTIES OF THIS ACTION:

COME NOW the plaintiffs, and in response to the motion of the defendants to vacate the referral to the Honorable John R. Kronenberg, U.S.

Magistrate, move the Honorable Magistrate not to vacate the order of reference, but instead to recommend to the District Judge that he take jurisdiction to rule on the due process claims of the plaintiffs, and to hear the same; and, in his discretion, either rule on the same or refer the matter to the United States Court of Claims and transfer the etire matter to the Court of Claims in Washington, D.C., for further consideration and determination; and, in respect thereto, plaintiffs set forth as follows:

1. Plaintiff, SEYMOUR R. MATANKY, M.D., commenced his medical services for the Welfare program in 1967. There were no guidelines set up and the doctor, along with others, was left to use his best judgment as to the medical care and treatment of patients in the various expert nursing care homes and medical centers to which patients were transferred from hospitals, where they were attended daily by their doctors.

2. Medicare was billed regularly for the treatments, and payments were adjusted and reviewed by BLUE SHIELD and their peer reviewers and advisors, and each claim, after adjustment by BLUE SHIELD, was paid; and as readjusted and accepted by the plaintiffs as the checks were issued, there were 2,412 claims for 305 beneficiaries, reviewed, considered, adjusted, and paid. There was no evidence of overpayment or irregularity. Guidelines were first set up by the Department of Health, Education & Welfare in 1972, limiting the number of visits a doctor could make to patients outside of regular hospitals. In the reviews of the claims, the plaintiff allowed the cutting off of approximately $30,000.00 in their acceptance of the amount paid.

3. The doctor continued his treatment of Medicare patients inside and outside of the hospitals and in special nursing homes and nursing centers, and continued to bill Medicare

and BLUE SHIELD for services to new and different, additional patients.

4. Without notice, or hearing, or grounds therefore to DR. MATANKY, CORBIN MEDICAL CLINIC, or the patients, it was at this point that BLUE SHIELD began to withhold the monies due for the services rendered to the new patients. This was as a result of a letter dated June 15, 1971, that Medicare reimbursement to DR. MATANKY and CORBIN MEDICAL CLINIC be withheld pending an investigation.

5. No wrong doing was specified in the letter, and no hearing was held or called prior to the requirements of due process requiring a notice and a hearing. (Sniadach v. Family Financial Corp., 395 U.S. 337, 23 L.ed.2d 349; Wisconsin v. Constantineau, 400 U.S. 433, 27 L.ed.2d 515; Goldberg v. Kelly, 397 U.S. 254, 25 L.ed.2d 287.)

6. No evidentiary hearing was held at that time, and no review or any proceeding taken to

examine the claims until 1974; and no further notice and no payments were made of the claims by BLUE SHIELD, which continued to withhold the monies which were assigned to DR. MATANKY for services.

7. On demand of DR. MATANKY and CORBIN MEDICAL CLINIC, a Fair hearing was set up, which hearing was held on August 7, 1978, before a Hearing Officer selected by BLUE SHIELD; and a decision rendered on October 25, 1978, by the Medicare hearing Officer, selected, appointed, and paid by BLUE SHIELD.

8. The sole issue which the Hearing Officer considered set up in his opinion was:

> "The purpose of this proceeding is not to check on claimant's medical or professional ability, the object is to see that Medicare payments were not made in violation of Medicare rules and regulations."

9. The opinion does not state any substantial showing of evidence of any violation of any statute, rule, or regulation, nor what rules and regulations were in effect between 1966 and 1971, for there were none. Doctors were left to their required duties as physicians to determine necessary medical care. The Hearing Officer sought to decide the case on rules and regulations set up subsequent to that date, all of which were not involved in any of the cases in which the funds were being withheld. The Hearing Officer, in violation of the plaintiffs' due process rights, failed to decide that there was no evidence of any regulations which covered the doctor's and clinic's duties, or services thereof for which he was paid during the years that were being adjudicated, all of which was a violation of due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

10. The Hearing Officer also failed to adjudicate that the Medicare Act and regulations limited the right of BLUE SHIELD and the government to proceed after three years. (Provider Reimbursement Manual, Section 2408.4 (7346); also see Sections 13,510.33 and 13,510.64.)

11. More than three years elapsed before any determination was made to $51,316.14, which had been withheld without evidence or explanation. The sum had been received by DR. MATANKY as an Accord and Satisfaction under both California and National laws. (C.C.P. Sections 1521, 1523, 1 C.J.S. Section 34528; Williston on Contracts, Vol. 6, Section 1856, p. 5230; Silver v. Grossman, 183 Cal. 694; Grayhill Drilling Co. v. Superior Oil Co., 39 Cal.2d 751, 753; Potter v. Pacific Coast Lbr. Co., 37 Cal.2d 592.

12. None of the previous payments were appealed from the reviews, and the government and BLUE SHIELD, having had one fair and full

opportunity on the merits of the claims, should not be permitted a second time, but should be bound by the principles of estoppel. (Bernard v. Bank of America, 19 Cal.2d 807.)

13. There was no evidence that any of the regulations or requirements which the Hearing Officer considered were ever published in the Federal Register.

14. There were several violations of due process of law guaranteed by the Fifth Amendment to the United States Constitution which required, and requires, access to the court as guaranteed by 42 U.S.C. Section 405(g).

15. The government moves to vacate reference to the Magistrate, pursuant to General Order No. 104-D, and in violation of Weber v. Secretary of Health, Education, and Welfare (9th Circuit), 503 F.2d 1049, and in the Supreme Court of the United States in Mathews v. Weber, 423 U.S. 261, 46 L.ed.2d 483.

16. In Weber v. Secretary of Health, Education, and Welfare, 503 F.2d 1049, the Court said:

"General Order No. 104-D adopted by the district court provides, inter alia, for reference to a full-time U.S. magistrate of all ' actions to review administrative determinations re (sic) entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. Section 405(g)."

"... Appellant conceded at argument that the procedure followed under the rule objected to is for the magistrate to examine the wirtten administrative record and make a recommendation to the judge. The parties are advised of the magistrate's initial opinion and are afforded time to present objections. If objection be

made, an opportunity is given to present briefs and argument in support thereof. The magistrate may then revise his original recommendation or adhere to it. Under either contingency he then forwards his recomcomendation and the administration record together with a report or proceedings before him, if any, to the judge for final action.

"[2] As so applied, we hold that the delegated authority is well within the intent of Congress in adopting the Magistrate Act; that the judicial review contemplated by the Social Security Act is adequatley provided and that the procedure comports with the requirement of exercise of judicial power under Article III of the United States Constitution. Were the broad provisions of General Order No. 104-D to be resorted to in the type of judicial review before us, the Secretary might have grounds to complain. As applied, the rule is not

vulnerable to the attack here mounted." (Weber v. Secretary of Health, Education, and Welfare, 503 F.2d 1049 at 1051.)

17. In Mathews v. Weber, 423, U.S. 261, 46 L.ed.2d 483, the Court said, on page 491, as follows:

> "[1b] We need not define the full reach of a magistrate's authority under the Act, or reach the broad provisions of General Order No. 104-D, in order to decide this case. Under the part of the order at issue the magistrates perform a limited function which falls well within the range of duties Congress empowered the district courts to assign to them. The magistrate is directed to conduct a preliminary review of a closed administrative record -- closed because under Sec. 205 (g) of the Social Security Act, 42 USC Sec. 405 (g) [42 USCS & 405 (g)], neither party may put any additional

evidence before the district court. The magistrate gives only a recommendation to the judge, and only on the single, narrow issue: is there in the record substantial evidence to support the Secretary's decision? The magistrare may do no more than propose [423 US 271] a recommendation, and neither the Sec. 636 (b) nor the General Order gives such recommendation presumptive weight. The district judge is free to follow it or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority -- and the responsibility -- to make an informed, final determination, we emphasize, remains with the judge." (46 L.ed.2d at 491-492.)

18. Since there were no rules, regulations, or guidelines covering the years 1967 to 1972, the Hearing Officer attempted to decide the case

retroactively on statutes and guidelines which covered subsequent transactions and which were not in effect during the periods when the various services were rendered; to change the conditions and establish rules, and reopen the payments of approved amounts constituted an expost facto determination of previously allowed costs, approved, and paid; and violated due process of law and equal protection of law.

19. In South Windsor Convalescent Home, Inc. v. Weinberger, 403 F. Supp. 515, the Court held that the retroactive application did not apply to recaptive reimbursements for accelerated depreciation during dates prior to the challenged regulations, and that such attempted recapture was not lawful, (403 F. Suppl 522.)

20. The Court quoted Justice Oliver Wendall Holmes in Blodgett v. Holden, 275 U.S. 142, at 149:

"I think it tolerably plain that the

act should be read as referring only to transactions taking place after it was passed. When to disregard the rule would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

21. The failure to give notice of the specific claims and the specific charges on which BLUE SHIELD justified its retention of the money, and the use thereof by it, was a violation of due process of law. The plaintiffs herein were entitled to full and adequate notice, as were the beneficiaries who were affected by the actions of BLUE SHIELD and the government.

22. No notice was given, and no evidentiary hearings were held, and neither the plaintiffs or any beneficiaries wete advised of the government's or BLUE SHIELD's objective during the three-years period in which the

statute and regulations required such notices to be served. (In re Oliver, 333 U.S. 257, 286; Cole v. Arkansas, 333 U.S. 196.)

23. It was a violation of due process of law to find that the money could be transferred on the basis of no evidence whatsoever in the record to support such a right. The charge that DR. MATANKY or CORBIN MEDICAL CLINIC had been overpaid was not established by any substantial evidence and was a sure denial of due process of law. It is as much a violation of due process of law to take money away from a person entitled to it, without any evidence to support the right, as it is to convict a man on charges not made and to punish him without evidence of his guilt. (See cases in Footnote in Thompson v. Louisville, 362 U.S. 199, 4 L.ed. 2d 654, 659.)

24. There is presumption that when Constitutional question are in issue, the availability of judicial review is presumed. (Cervoni v.

Secretary of Health, Education, and Welfare, 581 F.2d 1010, 1017; Califano, Jr. v. Sanders, 430 U.S. 99, 51 L.ed.2d 192.)

25. The district court may itself determine all issues or transfer the case to the Court of Claims, pursuant to 28 U.S.C. Sec. 1406c. (Dr. John T. MacDonald Foundation, Inc. v. Califano, 571 F.2d 328 (5th Circuit, 1978): South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 1910 (2nd Circuit, 1976).) Jurisdiction in the Court of Claims under 28 U.S.C. Sec. 1491.

26. The Hearing Officer also disregarded the regulations providing for res judicata of all matters previously determined after three years. (Title 20, C.F.R. Sections 404.973 and 405.1855; Fifth Amendment to the Constitution of the United States; Bernard v. Bank of America, 19 Cal.2d 807.) The contract as accepted by DR. MATANKY and BLUE SHIELD were property protected by the Constitution of the United States,

and not even Congress has authority to repudiate the obligation of these contracts. (Perry v. United States, 294 U.S. 330, 79 L.ed. 912; Union Pacific v. Coal, 99 U.S. 700, 25 L.ed. 496, 501.) This procedure ws also a violation of due process of law and the equal protection of the laws under the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs pray that the Magistrate overrule the objection of the government and hold a hearing and make a recommendation fovorable to the plaintiffs in the District Court, or the transfer the matter to the Court of Claims.

DATED: February 9, 1979.

MORRIS LAVINE
Attorney for Plaintiffs
SEYMOUR R. MATANKY and
CORBIN MEDICAL CLINIC

IN THE UNITED STATES COURT OF CLAIMS

NO. 67-80C

SEYMOUR R. MATANKY, M.D., AND CORBIN MEDICAL CLINIC	)	Jurisdiction; Medicare; Part B.
v.	)	SEP 17 1982
THE UNITED STATES	)	

Morris Lavine, attorney of record, for plaintiff.

Benjamin F. Wilson, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before FRIEDMAN, Chief Judge, DAVIS and BENNETT, Jugdes.

ORDER

PER CURIAM: Plaintiffs, a medical doctor and a medical clinic he owns and operates, seek amounts they say they were denied, under Part B of Medicare, for services rendered to

patients covered by Part B. Defendant moves to dismiss on the authority of United States v. Erika, 456 U.S. ___ (1982). All the points, statutory and constitutional, raised by plaintiffs to sustain the jurisdiction of this court, have been recently disposed of by this court in several prior orders granting defendant's motions to dismiss in comparable cases. See Regents of the University of Colorado v. United States, Ct. Cl. No. 518-80C (order of August 27, 1982); Drennan v. United States, Ct. Cl. No. 88-80C (order of August 27, 1982); Babcock Artificial Kidney Center, Inc. v. United State, Ct. Cl. No. 467-80C (order of September 10, 1982); Wanda Williams, v. United States, Ct. Cl. No. 696-80C (order of September 10, 1982)-- and the earlier decisions cited in those orders. Plaintiffs raise no new issues warranting separate discussion.

Plaintiffs' alterrnative request that the case be re-transferred to the United States

District Court for the Central District of California is governed by our recent decision in Berton Siegel v. United States, Ct. Cl. No. 119-81C (order of August 20, 1982). See Wanda Williams v. United States, supra.

Defendant's motion to dismiss is granted and the petition is dismissed. IT IS SO ORDERED.

SEP 17 1982

IN THE UNITED STATES COURT OF CLAIMS

SEYMOUR R. MATANKY, M.D. and CORBIN MEDICAL CLINIC, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	) CASE NO.67-80 C FILED U.S. Court of Appeals for the Federal Circuit OCT 1 1982 George E. Hutchinson Clerk

PETITION AND MOTION FOR RECONSIDERATION OF ORDER AND JUDGMENT OF DISMISSAL IN FAVOR OF THE DEFENDANT U.S.A. AND AGAINST THE PLAINTIFFS

Come now the plaintiffs herein Seymour R. Matanky, M.D. and Corbin Medical Clinic and petition and move this Honorable Court for reconsideration and rehearing of the order and judgment, filed September 17, 1982, dismissing the above entitled matter and entering judgment in favor of the defendant the U.S.A. and against these plaintiffs, on the following grounds and for the following reasons, to-wit:

1. As plaintiffs have previously argued, it is the position of these plaintiffs that they

are entitled to a trial by jury, a hearing and determination by an Article III Judge duly appointed within the federal judiciary. (Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 50 L.W. 4892, 6-29-82; Article III, U.S. Constitution and Fifth, Sixth and Seventh Amendments, U.S. Constitution)

This Court, in its order, has not addressed the issue posed by these plaintiffs as to the right of the plaintiffs to be heard by Article III Judges either in this Court of Claims or in a U.S. District Court. It is respectfully submitted that this Court has overlooked this issue in making its rulings and decision, and that if considered, would compel this Court to grant reconsideration and rehearing and thereafter reverse its decision to dismiss this action.

2. This Court has referred to various orders in its order and decision which are not generally published to the best of this counsel's knowledge, which were not attached to this

counsel's copy of the order and decision sent to him and which have not been provided to this counsel for his review and consideration in making this petition for reconsideration and rehearing.

It is respectfully objected that reference to orders and citations not generally available and to which the plaintiffs and their counsel have not had access constitutes a denial of due process, and particularly the right to know the basis of this Court's decision in order to be able to petition for rehearing and/or thereafter petition for appellate review. (Fifth Amendment, U.S. Constitution)

Plaintiffs' counsel has sent to this Court a request for the copying of the involved orders, but has not received a response or copies of the orders referred to in the order of this Court.

3. In Making its motion to dismiss, the U.S. Government attached parts of various cases

concerning which these plaintiffs were not involved and which were generally incoherent and unidentifiable, and which further were so difficult to make head or tail of that they constituted no notice to these plaintiffs as to the grounds or bases for a motion to dismiss.

This Court will remember that the plaintiffs and their counsel are located in Los Angeles, California whereas this Court is located in Washington, D.C.

It is respectfully submitted that a motion to dismiss based on unidentifiable documents concerning which some of the Judges in this Court may have personal familiarity due to having ruled on same constitutes a proceeding which approaches being a Star Chamber one in which the arguments are kept secret from these plaintiffs so that they cannot respond to them. These plaintiffs object that this style and course of proceedings constitutes a flagrant denial of due process of law under the Fifth,

Sixth and Seventh Amendments, U.S. Constitution as well as Article III, U.S. Constitution. (Hovey v. Elliott, 167 US 409)

4. These plaintiffs have raised what constitute an extensive number of factual issues as to whether violations of due process of law have occurred, including whether recoupment procedures well after any applicable statutes of limitations were commenced, whether there was an extensive denial of notice to the claimants and patients and whether the treatment involved was medically necessary.

A motion to dismiss, being an at law or law and motion procedure, does not deal with or attempt to deal with factual issues which should be tried before a Judge and jury, at an evidentiary hearing.

Further, this U.S. Court of Claims does not have jurisdiction of the due process claims, which should have been heard by an Article III Judge in a U.S. District Court. (Shuttlesworth

v. Birmingham, 358 US 101, 3 L.ed.2d 145; Garner v. Louisiana, 368 US 157, 7 L.ed.2d 207)

WHEREFORE, the plaintiffs Seymour R. Matanky, M.D. and Corbin Medical Clinic hereby move for reconsideration and rehearing and thereafter for reversal of this Honorable Court's order and judgment of dismissal entered herein on September 17, 1982, and that this matter be transferred back to the U.S. District Court for the Central District of California for further hearing and trial on their complaint.

Dated: September 30, 1982

Respectfully submitted,

/s/ Morris Lavine
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